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**DEPARTMENT OF COMMERCE**

**National Oceanic and Atmospheric Administration**

**RIN 0648-XE781**

**Taking and Importing Marine Mammals: Taking Marine Mammals Incidental to Navy Operations of Surveillance Towed Array Sensor System Low Frequency Active Sonar**

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Notice; issuance of four Letters of Authorization.

**SUMMARY:** In accordance with regulations issued under the Marine Mammal Protection Act, as amended, we hereby give notification that we, the National Marine Fisheries Service (NMFS), have issued four one-year Letters of Authorization (Authorizations) to the U.S. Navy (Navy) to take marine mammals by harassment incidental to their military readiness activities associated with the routine training, testing, and military operations of Surveillance Towed Array Sensor System Low Frequency Active (SURTASS LFA) sonar within the western and central North Pacific Ocean and Indian Ocean.

**DATES:** These Authorizations are effective from August 15, 2016, through August 14, 2017.

**ADDRESSES:** Electronic copies of the Navy's April 5, 2016 application letter and the Authorizations are available by writing to Jolie Harrison, Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910-3225, by telephoning the contact listed here (See **FOR FURTHER INFORMATION CONTACT**), or online at:

<http://www.nmfs.noaa.gov/pr/permits/incidental/military.htm#surtass>. The public may view the documents cited in this notice, by appointment, during regular business hours, at the aforementioned address.

**FOR FURTHER INFORMATION CONTACT:** Dale Youngkin, Office of Protected Resources, NMFS (301) 427-8401.

**SUPPLEMENTARY INFORMATION:**

**Background**

Section 101(a)(5)(A) of the Marine Mammal Protection Act (MMPA; 16 U.S.C. 1361 *et seq.*) directs the Secretary of Commerce to allow, upon request, the incidental, but not intentional taking of marine mammals by U.S. citizens if certain findings are made and regulations are issued. Under the MMPA, the term “take” means to harass, hunt, capture, or kill or to attempt to harass, hunt, capture, or kill marine mammals. We, NMFS, have been delegated the authority to issue such regulations and Authorizations.

With respect to military readiness activities, the MMPA defines harassment as “(i) any act that injures or has the significant potential to injure a marine mammal or marine mammal stock in the wild [Level A harassment]; or (ii) any act that disturbs or is likely to disturb a marine mammal or marine mammal stock in the wild by causing disruption of natural behavioral patterns, including, but not limited to, migration, surfacing, nursing, breeding, feeding, or sheltering, to a point where such behavioral patterns are abandoned or significantly altered [Level B harassment].”

Authorization may be granted for periods of five years or less if we find that the total taking will have a negligible impact on the affected species or stock(s) and will not have an unmitigable adverse impact on the availability of the species or stock(s) for taking for certain

subsistence uses. In addition, we must prescribe regulations that include permissible methods of taking and other means effecting the least practicable adverse impact on the species or stock and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of the species or stocks for taking for subsistence uses. The regulations also must include requirements pertaining to the monitoring and reporting of such taking.

Regulations governing the taking of marine mammals incidental to the Navy's routine training, testing, and military operations of SURTASS LFA sonar are in effect through August 15, 2017 (77 FR 50290, August 20, 2012) and are codified at 50 CFR part 218, subpart X. These regulations include mitigation, monitoring, and reporting requirements for the incidental taking of marine mammals by the SURTASS LFA sonar system. For detailed information on this action, please refer to the August 20, 2012, **Federal Register** Notice and 50 CFR part 218, subpart X. Under those regulations, we must publish a notice of issuance of an Authorization or Authorization renewal in the **Federal Register** within 30 days of a determination.

### **Summary of Request**

On April 5, 2016 we received an application from the Navy requesting a renewal of four Authorizations, originally issued on August 15, 2012 (77 FR 51969, August 28, 2012) for the taking of marine mammals incidental to routine training, testing, and military operations of SURTASS LFA sonar in the western and central North Pacific Ocean and Indian Ocean under the regulations issued on August 15, 2012 (77 FR 50290, August 20, 2012): one for the United States Naval Ship (USNS) VICTORIOUS (T-AGOS 19), one for the USNS ABLE (T-AGOS 20), one for the USNS EFFECTIVE (T-AGOS 21), and one for the USNS IMPECCABLE (T-AGOS 23). NMFS considered the Navy's application as adequate and complete on May 2, 2016.

NMFS has renewed the first cohort of 2012 Authorizations on an annual basis in 2013 (78 FR 57368, September 18, 2013); 2014 (79 FR 49501, August 21, 2014); and again in 2015 (80 FR 48296). The Navy's 2016 application for renewal requests that these four Authorizations become effective on August 15, 2016, for a period not to exceed one year.

### **Summary of Activity under the 2015 Authorizations**

The Navy submitted quarterly mission reports for the periods of August 2015 through May 2016 within the required timeframes. These quarterly reports include the dates and times of the military readiness activities; location of each SURTASS LFA sonar vessel; mission operational area; marine mammal observations; and records of any delays or suspensions of sonar operations. The Navy must also report on the number of marine mammals detected by visual, passive, and active acoustic monitoring and the estimated percentage of each marine mammal stock taken by Level A and Level B harassment. The reports indicate the following:

- The Navy conducted a total of eight missions from August 15, 2015, through May 14, 2016, in the northwestern Pacific Ocean, which totaled 20.56 mission days and resulted in 37.1 hours of LFA sonar transmissions (2.9% of the permitted sonar transmission time).
- The total percentage of each marine mammal stock taken by Level B harassment has not exceeded the 12 percent cap. For each stock, the percentage of take was well below the levels authorized in the 2015 Authorizations.
- The total percentage of each marine mammal stock taken by Level A harassment has not exceeded the levels authorized in the 2015 Authorizations. In fact, the Navy reported no incidences of Level A harassment takes.

The operational tempo, number of active transmission hours, marine mammal detections, behavioral observations, and level of anticipated take of marine mammals fall within the scope and nature of those contemplated by the final rule and authorized in the 2015 Authorizations.

#### *Monitoring Reports*

The Navy has submitted the monitoring reports on time as required under 50 CFR 218.236 and the 2015 Authorizations. We have reviewed these reports and determined them to be acceptable. Based on these reports, the Navy has not exceeded the average annual estimated usage of the four SURTASS LFA sonar systems and remains well within the take authorized. In accordance with the current SURTASS LFA sonar regulations (50 CFR 218.230), the Navy must submit an annual report to us no later than 45 days after the 2015 Authorizations have expired.

Upon receipt, we will post the annual report at:

<http://www.nmfs.noaa.gov/pr/permits/incidental/military.htm#surtass>.

#### *Level of Taking for 2016 Authorizations Period*

For the 2016 to 2017 Authorization period, the Navy expects to conduct the same type and amount of routine training, testing, and military operations of SURTASS LFA sonar in the western and central North Pacific and Indian Oceans as they have in the northwest Pacific Ocean and the north-central Pacific Ocean requested under the 2012, 2013, 2014, and 2015 Authorizations. Similarly, the Navy expects to remain within the annual take estimates analyzed in the final rule. We determined that the level of taking by incidental harassment from the activities described in the Authorizations and supporting application is consistent with the findings made for the total taking allowable under the 2012 final rule.

#### **Compliance with Mitigation, Monitoring, and Reporting Measures**

Based on our review of the Navy's quarterly mission reports, the Navy complied with the required visual, passive, and acoustic monitoring measures in the final rule and previous Authorizations. The Navy also followed the required shutdown and other protocols for mitigating impacts to marine mammals while conducting operations.

The Navy is also complying with required measures under 50 CFR 218.236(d) to gain and share information on the species. The Navy reports that they are continuing to work on information transfer, declassification and archiving of ambient noise data from the Navy's Integrated Undersea Surveillance System to the public.

Based on the foregoing information and the Navy's application, we determined that the mitigation, monitoring, and reporting measures required under 50 CFR 218.234, .235, and .236 and NMFS' 2013-2014; 2014 – 2015; and 2015-2016 Authorizations were undertaken and will be undertaken during the period of validity of the renewed 2016-2017 Authorizations.

### **Adaptive Management**

The final rule and the previous Authorizations include an adaptive management framework that allows us to consider new information and to determine (with input from the Navy regarding practicability) if modifications to mitigation and/or monitoring measures are appropriate and practicable. This framework includes a requirement for an annual meeting between NMFS and the Navy, if either agency deems it necessary.

Section 218.241 of the final rule describes examples of the types of information that could contribute to the decision to modify the mitigation or monitoring measures, including: (a) results from the Navy's monitoring from the previous year's operation of SURTASS LFA sonar; (b) compiled results of Navy-funded research and development studies; (c) results from specific stranding investigations; (d) results from general marine mammal and sound research funded by

the Navy or other sponsors; and (e) any information that reveals marine mammals may have been taken in a manner, extent or number not anticipated by these regulations or subsequent Authorizations. None of the information reviewed by NMFS or the Navy resulted in any modifications to the existing mitigation or monitoring measures at this time with the exception of consideration of new information regarding potential OBIA's.

#### *Consideration of Areas as Potential OBIA's*

On April 7, 2016, we and the Navy convened a meeting to review and discuss consideration of possible additional Offshore Biologically Important Areas (OBIA's) and modification of existing OBIA boundaries. International and U.S. waters were evaluated to consider newly available peer-reviewed scientific data, information, or survey data on marine areas that may be eligible for consideration as OBIA's. This evaluation also included review of information from the following sources:

- Cetacean and Sound Mapping Working Group Biologically Important Areas (CetMap BIA's);
- Marine Mammal Protected Area Task Force (MMPATF)- identified Important Marine Mammal Areas (IMMA's);
- World Database on Protected Areas (joint program of the International Union for Conservation of Nature [IUCN] and the United Nations Environment Programme [UNEP]);
- 2014 United Nations List of Protected Areas;
- Convention on Biological Diversity;
- Marine Protected Areas Global (Wood, 2007);

- Marine Conservation Institute MPAtlas; and
- Cetaceanhabitat.org

Several areas were identified for consideration. Three of the proposed new OBIAs are in areas authorized under the 2016-2017 Authorizations. However, the Navy agrees to treat these areas as OBIAs and will not transmit SURTASS LFA sonar at received levels above 180 dB SPL (rms) within 0.54 nmi (1 km) of the boundary of these potential OBIAs during the periods of biologically important activities for the purpose of the 2016-2017 Authorizations pending a final decision on their designation. NMFS and Navy will be including a description of the evaluation of these new areas in the Draft Supplemental Environmental Impact Statement and rulemaking process for the new (2017) SURTASS LFA sonar operations.

### **Litigation on Final Rule**

On July 15, 2016, the U.S. Court of Appeals for the Ninth Circuit issued a decision in *NRDC, et al. v. Pritzker, et al.*, which challenged NMFS' 2012 final rule for SURTASS LFA sonar. The Ninth Circuit had not, however, issued a mandate in that case at the time the LOAs were issued.

### **Technical Guidance for Assessing the Effects of Anthropogenic Sound on Marine Mammal Hearing**

On August 4, 2016, NMFS released its Technical Guidance for Assessing the Effects of Anthropogenic Sound on Marine Mammal Hearing (Guidance). This new guidance established new thresholds for predicting auditory injury, which equates to Level A harassment under the MMPA. In the Federal Register Notice (81 FR 51694), NMFS explained the approach it would take during a transition period, wherein we balance the need to consider this new best available science with the fact that some applicants have already committed time and resources to the



development of analyses based on our previous guidance and have constraints that preclude the recalculation of take estimates, as well as where the action is in the agency's decision-making pipeline. In that Notice, we included a non-exhaustive list of factors that would inform the most appropriate approach for considering the new Guidance, including: the scope of effects; how far in the process the applicant has progressed; when the authorization is needed; the cost and complexity of the analysis; and the degree to which the guidance is expected to affect our analysis. In this case, the Navy's SURTASS LFA sonar rule was issued in 2012, this is the last remaining year of activity that will be authorized under this rule, and they need the authorization by August 12th in order to ensure continuity of operations. The SURTASS LFA sonar rule considers the potential for small numbers of cetaceans incurring auditory injury in the effects analysis and, as noted in the Final Rule, the Navy is authorized to take small numbers of cetaceans by Level A harassment as a precautionary measure even though quantitative analyses showed no Level A takes. The Navy has a robust and practicable monitoring and mitigation program that we believe is very effective in reducing the likelihood of injury. Additionally, we believe that a fair number of marine mammals will intentionally avoid approaching within distances of this slow-moving source that would result in injury. In summary, we have considered the new Guidance and believe that the likelihood of injury is adequately addressed in the analysis in the rule and appropriate protective measures are in place in the LOA.

### **Authorization**

We have issued four Authorizations to the Navy, authorizing the incidental harassment of marine mammals, incidental to operating the four SURTASS LFA sonar systems for routine training, testing and use during military operations. Issuance of these four Authorizations is based on findings, described in the preamble to the final rule (77 FR 50290, August 20, 2012)

and supported by information contained in the Navy's required reports on SURTASS LFA sonar and their application, that the activities described under these four Authorizations will have a negligible impact on marine mammal species or stocks and will not have an unmitigable adverse impact on their availability for taking for subsistence uses.

These Authorizations remain valid through August 14, 2017, provided the Navy remains in conformance with the conditions of the regulations and the LOAs, and the mitigation, monitoring, and reporting requirements described in 50 CFR 218.230 through 218.241 (77 FR 50290, August 20, 2012) and in the Authorizations are undertaken.

Dated: August 12, 2016.

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Donna S. Wieting,  
Director,  
Office of Protected Resources,  
National Marine Fisheries Service.

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